DESA TECK GUAN KOKO SDN. BHD.

v.

SYARIKAT HAP FOH HING (SUING AS A FIRM)

HIGH COURT, KOTA KINABALU
TUAN IAN H.C. CHIN J.
[ORIGINATING MOTION NO. 12 OF 1986]
9 APRIL 1994

ARBITRATION: Application to set aside award of arbitrator - Whether arbitrator erred in law - Whether claimant could continue to extract timber under a timber extraction agreement with the applicant without a timber extraction licence - Whether applicant repudiated extraction agreement - Whether claimant accepted repudiation - Whether claimant lost right to terminate - Whether arbitrator misdirected himself by failing to consider all the facts on the issue of whether claimant had elected to affirm the extraction agreement after its repudiation by the applicant - Whether the question of a timber licence being required for the extraction of timber from the land had been specifically referred to the arbitrator - Whether the Court could interfere with the decision of the arbitrator where a specific question of law had been referred to him - Whether arbitrator's finding of fact that the claimant and Syarikat Wei Siong were separate legal entities was inconsistent with the arbitrator's conclusion that the applicant had wrongfully repudiated the extraction agreement through a letter to the Forest Department when the letter requested action against Syarikat Wei Siong and not the claimant - Whether claimant's action should be based on tort - Whether the arbitrator's award was given out of jurisdiction.

The applicant was the owner of a parcel of land and the holder of a timber licence which authorised it to extract timber from the said land. On 16 April 1981 the applicant empowered the sole proprietor of Syarikat Wei Siong (WS) to extract, remove, sell and export all the merchantable timber from the land. By an agreement of the same date the applicant sold all timber to be extracted to WS. On 18 June 1981 the claimant and the applicant entered into an extraction agreement under which the claimant was to extract merchantable timber from the applicant's land. On 28 October 1982 the applicant wrote to the Conservator of Forests (the Forest Department) informing them that the agreement between the applicant and WS had expired on 16 October 1982 and that all extraction of timber by WS had to stop by 28 October 1982. Pursuant to this letter, the Forest Department wrote to WS on 5 November 1982 and cancelled the timber licence. Production ended but the claimant continued to remove from the land logs felled before their operation was stopped.

The matter went before an arbitrator who, in deciding for the claimant, found that the applicant had intended by their letter to the Forest Department to terminate the extraction agreement on the assumption, which was held by all parties, that without the timber licence the extraction could not continue. The applicant applied to the High Court to set aside the award.

Held:

[1] On the issue of the timber licence and whether the extraction agreement had been repudiated by the applicant, the Court found that the land in question was alienated land which did not require a timber licence for the extraction of timber pursuant to ss. 23, 24(1) & (5) of the Forests Enactment 1968 (Sabah). What was required to remove timber away from the land was a transit pass which could be obtained under r. 15(1) of the Forest Rules 1969. Therefore the arbitrator's finding that the applicant had repudiated the extraction agreement was based on an erroneous belief.

[2] If the claimant had accepted the repudiation they would have left the land with their machinery but they had instead remained and continued to haul and tow timber obviously pursuant to a provision of the extraction agreement. Once the claimant elected to keep the extraction agreement alive, the claimant lost its right to terminate and sue for breach of the agreement.

[3] The arbitrator had completely failed to direct his mind to the claimant's act of continuing to haul and tow timber and to consider whether it could possibly be inferred from these acts that the claimant had elected to continue the extraction agreement. The arbitrator had stated that the issue was only whether the claimant had lost the right to continue extraction of the timber. That was a serious misdirection.

[4] The Court could not interfere where a specific question of law was referred to the decision of the arbitrator and the parties were bound by the decision even though it might be erroneous. Notwithstanding, the Court found that the question of whether a timber licence was required for the extraction of timber from the land had not been specifically referred to the

arbitrator. The Court was of the view that it was unnecessary to decide on that question because what in effect was the legal position was immaterial since the parties had assumed, even though wrongly, that a timber licence was essential. Though the arbitrator had made an error as to the law, that error was not the basis of his award because it was not necessary for him to decide whether the law required a timber licence for the extraction of timber from alienated land. Therefore the award could not be set aside.

[5] The arbitrator had made a finding of fact that the applicant in writing to the Forest Department had intended to prevent the extraction of timber by the claimant even though the letter had been directed at Syarikat Wei Siong. There was no inconsistency nor error on the face of the award.

[6] With regard to applicant's Counsel's contention that the act of stopping the claimant from extracting timber was the act of a third party, the Forest Department, and that therefore any action against the applicant should be based on tort which was outside the jurisdiction of the arbitrator, the Court accepted the submission of the claimant's Counsel that the breach which gave rise to the claimant's cause of action against the applicant was the act of the applicant in writing the letter to the Forestry Department to stop WS from further extracting timber. It was that act of the applicant which gave rise to the breach as it resulted in the cancellation of the timber licence and the termination of all extraction operations of the claimant on the land. By that act the applicant had disabled itself from performing the extraction agreement and was therefore an act of repudiation. Such act by the applicant clearly could not be attributed to the act of a third party.

[7] The applicant succeeded in one of the grounds for setting aside the award. The Court therefore set aside the award save for the part that dismissed the applicant's claim. The Court felt it unfortunate that the arbitrator had not properly directed his mind to the facts and law concerning the question of election which had resulted in the setting aside of the award. Even though the applicant succeeded in its motion it was clear that the applicant was in breach of the extraction agreement. The Court therefore ordered the parties to bear their own costs both here and below.

[Applicant's motion allowed. Parties to bear their own costs here and below].

Cases referred to:
Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd [1980] 1 All ER 571 ***(refd)***
Chai Ming v. The Overseas Assurance Corporation Ltd [1962] ML J 282 ***(refd)***
F.R. Absalom Ltd v. Great Western (London) Garden Village Society Ltd [1933] AC 592 ***(refd)***
In re King & Duveen [1913] 2 KB 32 ***(refd)***
Kelantan Government v. Duff Development Co. Ltd. [1923] AC 395 ***(refd)***
The Attorney-General of Singapore v. Wong Wai Cheng [1980] 1 ML J 131 ***(refd)***
Ganda Edible Oils Sdn. Bhd. v. Transgrain B.V. [1988] 1 ML J 428 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40
Forests Enactment 1968 (Sabah), ss. 23(a), (b), 24(1), (5)
Forest Rules 1969, r. 15(1)
Workmen's Compensation Ordinance

Other sources referred to:
Chitty on Contracts, Vol. 1, 26th Edn., para 1792
Halsbury's Laws of England, Vol. 2, 4th Edn., paras 610, 623

For the applicant - Colin Lau; M/s Szetu & Kong
For the claimant - Lawrence Chong; M/s Yong & Chia

JUDGMENT

Ian H.C. Chin J:

This is an application by Desa-Teck Guan Koko Sdn. Bhd. ("the applicant") to set aside the award of an arbitrator dated 6 August 1986 given in favour of Syarikat Hap Foh Hing ("the claimant") for the sum of RM203,683.68, interest and costs. The grounds advanced by the applicant for setting aside the award are briefly as follows:

(1) that the arbitrator erred in law in finding that the claimant could not continue to extract timber under the terms of a timber extraction agreement dated 18 June 1981 ("the extraction agreement") without a timber extraction licence;

(2) that the arbitrator erred in law by misdirecting himself in arriving at the conclusion that the applicant had repudiated the extraction agreement;

(3) that the arbitrator had failed to consider all the facts and circumstances of the case giving rise to the legal issues of whether or not the claimant had in fact lost their right of termination;

(4) that the arbitrator's finding of fact that the claimant and Syarikat Wei Siong are separate legal entities is inconsistent with and

contradicts the arbitrator's conclusion that a letter dated 28 October 1982 from the claimant to the Forestry Department amounted to a repudiation of the extraction agreement when the letter was directed at Syarikat Wei Siong; and

(5) that the arbitrator's award is void or given outside his jurisdiction because the action of the claimant is based on tort.

Facts of Case

The claimant was a partnership firm with two partners called Chung Kim Fui and Thien Chee Kiong while the applicant was at all relevant time the owner of a parcel of land measuring 6,773 acres ("the said land") and the holder of a Licence To Take Forest Produce No. FOSS 18/81 ("timber licence") issued under s. 24 of the Forests Enactment. The timber licence authorised the applicant to extract timber from the said land. The applicant had on 16 April 1981 empowered one Chung Kim Siong, the sole proprietor of Syarikat Wei Siong and who is the brother of Chung Kim Fui, to extract, remove, sell and export all the merchantable timber from the said land. By an agreement of the same date, the applicant sold all the timber to be extracted from the land to Syarikat Wei Siong. Some two months later, the claimant and the applicant on 18 June 1981 entered into the extraction agreement under which the claimant were to extract merchantable timber from 3,000 acres of the said land. In pursuance to the extraction agreement the claimant entered the land with machinery and began extraction of timber. The claimant were paid their dues under the extraction agreement by Syarikat Wei Siong who paid on behalf of the applicant. There does not appear to be any differences between the parties until the letter of 28 October 1982 which the applicant wrote to the Conservator of Forests (as that office was then known) in the following terms:

28 Oktober 1982

Pemelihara Hutan,
Jabatan Hutan,
Sandakan

Tuan

Pe: Penamatan Perjanjian Pengeluaran Kayubalak Dibawah Provisional Lease No: 096290112

Dengan sukacitanya, kami ingin memberitahu tuan bahawa Perjanjian Pengeluaran Kayubalak yang ditandatangani diantara Syarikat Wei Siong, kontractor kayubalak, dan Desa Teck Guan Koko Sdn. Bhd., memilik tanah, telah tamat pada 16 Oktober 1982.

Bagaimanapun, semua pengeluaran kayubalak oleh kontractor itu mesti berhenti dengan segera mulai hari ini 28 Oktober 1982 sehingga notis selanjutnya.

Kerjasama tuan dalam perkara ini sangatlah dihargai.

Terima kasih.

Yang benar

(Signed by Lai Fook Chun)
For Desa-Teck Guan Koko Sdn. Bhd.

In pursuance to this letter, the Forest Department wrote to a Syarikat Wei Siong (Sandakan) Sdn. Bhd. by a letter dated 5 November 1982 and cancelled the timber licence. Those are in fact all the facts of this case. Since the various conclusions of the arbitrator have been assailed, it is necessary to set out verbatim some parts of the reasons of the arbitrator which I will do when I deal with the respective grounds advanced for setting aside the award of the arbitrator. With that I will proceed to deal with the grounds urged by Mr. Colin Lau, Counsel for the applicant and give my decisions.

Grounds of Appeal

The first two grounds can be conveniently dealt together because they both dealt with the question of whether the extraction agreement was repudiated by the applicant. It will be recalled that the first of the grounds is that the arbitrator erred in law in finding that the claimant could not continue to extract timber under the terms of the extraction agreement without a timber licence. Mr. Colin Lau referred to the following two sentences of the arbitrator with regard to this issue, *viz*:

> ...it was obvious that the [applicant] intended to terminate the [extraction agreement] by writing exhibit C-2 (exhibit HNM-3) as they must had known that without the Timber Licence the claimant could not continue to extract timber.
>
> ...could not be taken to mean, as Counsel would have it, that no timber licence is necessary to extract timber from private land. Such a view is contrary to the provisions of the Forest Enactment 1968...

Mr. Colin Lau submitted that from those two sentences the arbitrator was clearly of the view

that without a timber licence the timber could not be extracted by the claimant. Mr. Colin Lau also argued that the letter from the applicant to the Forest Department referred to a Syarikat Wei Siong, against which the Forest Department was asked to take action, and therefore, cannot be construed as disclosing the intention of the applicant to repudiate the extraction agreement which was made with the claimant. The Court was referred to *Woodar Investment Development Ltd v. Wimpey Construction UK Ltd* [1980] 1 All ER 571, at p. 589, where it is said:

> In the *Spettable* case Atkin LJ said of the various definitions of repudiation:
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> > They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract **made quite plain** his own intention not to perform the contract (emphasis mine)...

Mr. Lawrence Chong, on the other hand, argued that the arbitrator's finding must be read in its context. That proposition of law cannot be disputed and it was in fact from the following passages of the reasonings of the arbitrator that the two separate sentences, quoted by Mr. Colin Lau (and which I have underlined below), are taken from, *viz*:

> *4th Issue*
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> I now turn to consider two other important submissions of Counsel for the [applicant]. First, he submitted that as the order (exhibit C1) of the Forest Department was not addressed to the claimant, it could not have stopped their extraction operations, and that the [applicant] had no intention to terminate the [extraction agreement]. [applicant's] intention, he submitted, was to terminate the [Timber Sales agreement] with Syarikat Wei Siong. But, SyArikat Wei Siong was not the extraction contractor and had no extraction operations conducted under the [Timber Sales Agreement]; all the [timber sales agreement] gave them was a right to buy exclusively the merchantable timber, if any, extracted from the said land. Thus it was unnecessary to ask the Forest Department to stop the extraction if the intention were to terminate the [timber sales agreement]. The claimant was the extraction contractor and it was obvious that the respondent intended to terminate the [extraction agreement] by writing exhibit C-2 as **they must had known that without the timber licence the claimant could not continue to extract timber.**
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> *5th Issue*
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> Next, Mr. Shim submitted that notwithstanding the stoppage ordered by the Forest Department, the claimant managed to continue extraction operations albeit unlawfully. In other words, the claimant did not accept the repudiation of the [extraction agreement]. He relied on the letter dated 18 November 1982 written by the Forest Department to the [applicant] (exhibit C-6) the letter dated 15 November 1982 from the claimant (exhibit C-3) and production record (exhibit C-5). As for exhibit C-6, it dealt with the removal of timber already felled and not standing timber. This is apparent from the fact that it was a reply to exhibit C-7 (letter dated 17 November 1982 from Syarikat Wei Siong which asked about *inter alia*, the timber already felled.) Thus the statement in exhibit C-6 that "as it is a private land it is up to you to do the stopping" could only refer to the removal of felled timber. **Exhibit C-6 could not be taken to mean, as Counsel would have it, that no timber licence is necessary to extract timber from private land. Such a view is contrary to the provisions of the Forest Enactment 1968. Further, there is nothing in exhibit C-6 to suggest that the order (exhibit C-1) of the said Department is revoked.**
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> The production record (exhibit C-5) clearly showed that production ended in November 1982. Counsel was correct in pointing out that logs were being removed from the said land after 5 November 1982 as was apparent from rafts 10 11, 12 and 13 shown in exhibit C-5. But these were timber felled by the claimant before their operations were stopped. This fact is proved not only by the evidence of the claimant (CW1) but also that of the [applicant] (RW1) who said that after TL was cancelled he saw a large heap of logs in the said land and that the workers, equipment and machinery of the claimant were not working. Exhibit C-16 (letter dated 3 December 1982 from Syarikat Wei Siong to the Forest Department) also confirmed that 3,000 cubic metres of logs needed to be towed away. Although the claimant had in their letter (exhibit C-3) said that they would continue extraction operations, CW1 explained in evidence, which I accept, that they were subsequently ordered by forest officers to stop extraction operations (exhibit C-1) and the other documentary evidence produced, notably the production record (exhibit C-5) which showed that the production in the said land ended in November 1982. This is further fortified by the fact that removal passes were required to remove all felled timber and claimant's solicitors' letter dated 21 March 1983 (exhibit C-4).

> Mr. Shim seems to suggest in his submission that the acts of hauling and towing the felled timber to the log pond after the timber licence was cancelled meant that the claimant had carried on extraction operations within the meaning of the [extraction agreement]. The claimant lost the right to fell more standing timber as a result of the cancellation of the timber licence. This is the crux of their case and with respect, the fact that the claimant continued to haul and tow away those timber already felled is therefore irrelevant.

Mr. Lawrence Chong argued that it was a finding of fact when the arbitrator found that the applicant had intended, by their letter to the Forest Department, to terminate the extraction agreement. I am in agreement with him. It was envisaged, even though they may have misunderstood the law, that the timber licence was required for the purposes of the extraction agreement and hence provision was made in the extraction agreement for the timber licence. Therefore, since the claimant and the applicant thought that the timber licence was crucial, it is possible for the applicant to have thought that without it, the extraction agreement can be brought to an end. That in effect was the reasoning of the arbitrator for his conclusion, on a factual basis, that the claimant cannot continue to extract timber because both parties had thought, as shown by the provision in the extraction agreement for such a timber licence, that the timber licence was essential when in law such a timber licence was not necessary for extracting timber on alienated land. It matters not that the arbitrator was also under the same erroneous belief as that of the parties that a timber licence was required. The parties proceeded on the assumption that the timber licence was required and the arbitrator found that the applicant thought that, by getting the Forest Department to cancel the timber licence, they would be able to put an end to the extraction agreement since they all thought that without the timber licence the extraction cannot continue. I have said that a timber licence is not required; this can be gathered from the following provisions of the Forests Enactment, 1968 (Sabah), *viz*:

> 23. ...any person who (a) ...fells...any forest produce on any State land...; or (b) removes any forest produce on any alienated land beyond the boundaries of that land, shall be guilty of an offence.
>
> 24.(1)...the director ...may issue licences for the doing of all or any of the acts prohibited by sections ...23...
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> .....
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> (5) No licence shall be issued for the doing of any act on alienated land except on the application by, or with the written permission of, the owner or Lessee of such land.

For our purposes, the said land is alienated land. It is obvious from the Forests Enactment that no licence is required for the extraction of timber from the said land. What is required, in order to remove timber away from the said land is a transit pass which can be obtained under Rule 15(1) of the Forest Rules 1969.

Mr. Lawrence Chong, Counsel for the claimant, further argued that even if the arbitrator had erred, the award cannot be set aside and the Court was referred to the following authorities as supporting his contention. The first of the cases referred to was *Chai Ming v. The Overseas Assurance Corporation Ltd.* [1962] MLJ 282 which held that a Court cannot interfere where a specific question of law was referred to the decision of the arbitrator and the parties are bound by it even though it may be erroneous. In that case the question of whether a tree-feller was a workman within the meaning of the Workmen's Compensation Ordinance was referred to arbitration and the arbitrator decided that he was not. The Court there decided that the award cannot be interfered with and cited the following passage of *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd* [1933] AC 592, at p. 607:

> ...it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision... The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

The Court then came to the conclusion that a specific question of law was referred to the arbitrator because the arbitrator after hearing evidence came to certain findings of facts and

concluded that the tree-feller was not a workman and the arbitrator gave his reasons in law and in fact. The Court there also referred to the case of *In re King & Duveen* [1913] 2 KB 32 where one of submission for arbitration was:

> (c) if such, if any, of the said flues as do emit smoke as aforesaid should continue to emit smoke after the completion of the works directed by you, if any, or if you should be of opinion that no works can usefully be done to cure such flues, then whether under the agreement ... the executors of Sir Joseph Joel Duveen are liable to pay damages in respect thereof to Mr. Henry James King, and, if they are so liable, what damages should be paid;,

the arbitrator decided that the said executors were not liable after also holding that no further works can cure the nuisance. The Court there held that the arbitrator had been referred a specific question of law and Channell J., at p. 35 - 36 had this to say:

> It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside...; but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator...

The next case referred to is *Kelantan Government v. Duff Development Co. Ltd* [1923] AC 395 where the points referred for decisions of the arbitrator were:

> (1) What, upon the true construction of the deed of cancellation, was the nature and extent of the obligation of the Government in regards to the making of the cart road?
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> (2) Whether, upon the true construction of the deed of cancellation, the Government had entered into a covenant with the company to construct the railway, and if so, in what terms, and what was the nature and extent of the obligation of the Government under such covenant?

and the Court there said, at p. 409:

> The reference, therefore, was a reference as to construction. If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally - for instance, that he decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose.

A final authority referred is **Halsbury's Laws of England,** 4th edn., Vol. 2 at para 623, where it is said that the Court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value. There is no dispute as to the correctness of those principles of law. Mr. Colin Lau referred to the case of *The Attorney-General of Singapore v. Wong Wai Cheng* [1980] 1 MLJ 131 where it was held that the failure of the arbitrator to construe the contract, in particular, a clause 32(b) of the conditions of contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contractor, amounted to an error of law apparent on the face of the award. Mr. Collin Lau also referred to the more recent case of *Ganda Edible Oils Sdn. Bhd. v. Transgrain B.V.* [1988] 1 MLJ 428 SC, at p. 430-431 where it is stated:

> It was also contended by the appellant that the trial Judge erred in law by holding that there was no error of law on the face of the arbitration award. In fact as stated earlier that was the ground on which the application to the Judge was based. The principles that have to be applied in the instant case may be set out as follows:
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> > An arbitrator's award may be set aside for error of law appearing on the face to it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the

jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that it can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance there is error in law which may be ground for setting aside the award.

(**Halsbury's Laws of England,** Fourth Edn., Vol. 2, p. 334 para 623 "Error of law on face of award").

A distinction should be drawn between a case where a dispute is referred to an arbitrator in which a question of law becomes material from the case in which a specific question of law has been referred to him. The position is that in the former case the Court can interfere if and when an error appears on the face of the award but in the latter no such interference is possible upon the ground that the decision on the question of law is an erroneous one (per Raja Azlan Shah J. (as he then was) in Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority[1]). In that case no question of law was referred to the arbitrator but what was submitted was a question of law which incidentally and necessarily arose in applying certain facts. In our considered judgment in the present appeal, a similar situation arose. It is clear that in applying certain facts which led to the dispute between the parties, the arbitrator had also to construe the provisions of s. 37 of the SGO which was relied by the respondent and also s. 42 which incidentally arose in applying those facts. Since the reference involved both questions of law and fact, the High Court was in a position to review the award if and when there is an error apparent on the face of the award.

Having apprised myself of the legal principles and enlightened by the various cases which serve to illustrate the working of the principles, I will now direct my attention to the facts of the present case. Since no complain was directed at the summary made by the arbitrator as to what the arbitrator perceived as being the questions referred to him for decision, I will assume that his summary of the questions, or issues as the arbitrator put them, referred to him for decision, which is stated in his "Reasons Of Final Award", is correct. The questions or issues for the decision of the arbitrator are these:

1. Did the Forest Department stop the extraction operations of the claimant pursuant to their order as contained in exhibit c-17.
2. Was such stoppage caused by the action of the respondent in asking the said Department to stop all extraction operations in the said land by their letter dated 28 October 1982 (exhibit c-2)?
3. Was the [applicant] justified in asking the said Department to stop such operations?
4. Whether or not by such action the [applicant] intended to terminate the [extraction agreement]
5. Whether or not the claimant accepted the repudiation.
6. Whether or not the [extraction agreement] was varied by increasing the price payable thereunder to RM2.50 per cubic foot.

It is clear from the summary, which I have just quoted, the question of whether a timber licence is required for the extraction of timber from the said land was not specifically referred to the arbitrator. In fact, I am of the view, that it was unnecessary to decide on that question because what in effect is the legal position is immaterial since the parties have assumed, even though wrongly, as I have stated earlier, that a timber licence was essential. I am of the opinion that though the arbitrator had made an error as to the law, that error was not the basis of his award because it was not necessary for him to decide whether the law requires a timber licence for the extraction of timber from alienated land. Therefore the award cannot be set aside on those two grounds.

The third ground advanced by the applicant for setting aside the award is that there was a failure to consider and appreciate the claimant's right to termination was lost by election and

there was unreasonable delay. Mr. Lawrence Chong argued that these were not issues which the arbitrator was required to decide and this, Mr. Lawrence Chong pointed out, can be gathered from the absence of any mention of such issues when the erstwhile Counsel for the applicant addressed the arbitrator. Mr. Colin Lau replied and said the written submission before the arbitrator cannot be referred because that document does not form part of the award nor incorporated to the award. Apart from that, Mr. Collin Lau conceded that the "unreasonable delay" point was not canvassed before the arbitrator but he added that the defence of election was clearly raised because the arbitrator had referred to it in the sentence: "In other words, the claimant did not accept the repudiation of the [extraction agreement]". Actually, this sentence was immediately preceded by another sentence which reads: "Next Mr. Shim [the erstwhile Counsel for the applicant] submitted that notwithstanding the stoppage ordered by the Forest Department, the claimant managed to continue extraction operations albeit unlawfully." These two statements were made in relation to issue 5, which was whether or not the claimant accepted the repudiation. Since it is conceded that the "unreasonable delay" point was not canvassed before the arbitrator, I will concern myself only with the question of election. Surely, whether a repudiation of the extraction agreement was accepted involves the determination of whether the claimant had elected to treat the extraction agreement as still subsisting, with a resulting right to insist on its performance, or as repudiated, in which case the claimant regards the extraction agreement as at an end and can sue for damages. In any event, that this issue was referred for the decision of the arbitrator can be gathered from what the arbitrator said in connection with the 5th issue, which I have earlier set out, but part of which I repeat here, *viz*:

> *5th issue*
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> Next, Mr. Shim submitted that notwithstanding the stoppage ordered by the Forest Department, the claimant managed to continue extraction operations albeit unlawfully. In other words, the claimant did not accept the repudiation of the [extraction agreement]...
>
> *Conclusions*
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> On the evidence adduced, I am satisfied that the respondent's extraction operations were stopped by the Forest Department and that such stoppage was caused by the action of the respondent in asking the said Department to stop such operations. By such action, the [applicant] had refused to perform or disabled themselves from performing the [extraction agreement]. Such wrongful repudiation or breach gave the claimant the right to rescind the [extraction agreement] pursuant to s. 40 of the Contracts Act 1950 by accepting the repudiation or breach; ... I am satisfied that the claimant accepted the repudiation and did not by their words and conduct signified their acquiescence in the continuance of the [extraction agreement]...

What, then, are the misdirections of the arbitrator as regards his decision, if any, whether the applicant had made an election or not? Mr. Colin Lau argued that the arbitrator misdirected himself when he said: "...with respect, the fact that the claimant continued, to haul and tow away those timber already felled is therefore irrelevant." It is not in dispute that, despite the alleged termination of the timber licence by the letter of the Forest Department, the claimant continued to haul and tow timber. Mr. Colin Lau argued that such acts were pursuant to a term of the extraction agreement and since the claimant was continuing to perform the extraction agreement, such act could only mean that the claimant had not accepted the repudiation and that the purported acceptance of the alleged breach by the claimant's solicitors' letter in March 1993 further supports this contention. Mr. Lawrence Chong however argued that the arbitrator had considered all the facts and circumstances of the case giving rise to the legal issues of whether or not the claimant had lost their right of termination and the arbitrator had concluded that the claimant were prevented by the Forest Department from extracting more timber and, therefore, there was no question of the claimant losing their right of termination. He added that the act of towing and hauling could only take place after felling and were irrelevant if no trees could be chopped down. Mr. Lawrence Chong also referred to the following principle of law, which I agree, *viz*:

> The Court should approach an award with a desire to support rather than destroy it, and presumes, unless and until the contrary is shown, that the arbitrator or umpire has by his award determined those matters, and those matters only, which were referred to him. The burden of proving that he has awarded on matters not referred, or that he has failed or omitted to award on matters which were

referred, lies on the party who seeks to impeach the award.
(**Halsbury's Laws of England,** Vol. 2, 4th edn. at para 610.)

It is necessary to reproduce certain clauses of the extraction agreement to enable the Court to determine the validity of the respective arguments, *viz*:

> 1. ...the [applicant]...engage the [claimant] to extract all the merchantable timbers from the said land and transport the same to a log pond or log ponds at Sandakan...
>
> 7. The [applicant] shall not employ any other person...apart from the [claimant] to extract merchantable timbers from the said land...
>
> 14. The term "extract" or "extraction" as used in this agreement shall include all work of felling of trees cross-cutting into logs of sound merchantable timbers debarking transporting and delivery of such merchantable timbers in accordance with the term of this agreement.

It is clear from the clauses of the extraction agreement that I have just reproduced that it is a term of the extraction agreement that the claimant had to haul and tow the logs to a log pond in Sandakan. The facts as found by the arbitrator were these. The claimant had continued the hauling and towing of timber after the Forest Department had issued the letter dated 5 November 1982 to Syarikat Wei Siong (Sandakan) Sdn. Bhd. to cancel the licence. The arbitrator had also held that Syarikat Wei Siong (Sandakan) Sdn. Bhd. and Syarikat Wei Siong to be the "same entity". The arbitrator had also decided that though the letter of the applicant was directed at Syarikat Wei Siong it was nevertheless effective to repudiate the extraction agreement, which conclusion is the subject of another attack by the applicant which should not concern us for the moment. To return to the issue at hand, the Court has now to ask whether the acts of hauling and towing timber, after the extraction agreement was repudiated by the applicant, are relevant or not for construing whether the claimant had elected to treat the extraction agreement as alive, that is, whether the claimant had refused to accept the repudiation. Without doubt, the claimant in continuing to haul and tow the timber, which was an obligation on the part of the claimant under the extraction agreement, after the extraction agreement was alleged to have been repudiated by the applicant, could possibly constitute an election to treat the extraction agreement as subsisting. Those are acts on the part of the claimant from which it could possibly be inferred that they intended to go on with the contract regardless of the breach. This is more so when one takes into account the letter of the claimant, issued after the alleged repudiation, and by which the claimant maintained they would continue extraction operation. Therefore, if such acts of the claimant which I have just referred, could result in the inference that the extraction agreement, despite the repudiation, had been affirmed by the claimant, how, then, could it be said, as the arbitrator had said and which Mr. Lawrence Chong also maintained, that those facts are "irrelevant". The claimant may have thought they had lost the right to fell further trees but the claimant continued to haul and tow the logs, which was an obligation of the claimant under the extraction agreement, after the extraction agreement was terminated. It can be asked, if the acts of towing and hauling were not pursuant to the terms under the extraction agreement, under what arrangement were the claimant still hauling and towing the timber after the extraction agreement was repudiated? If the claimant had accepted the repudiation they would have left the said land with their machinery but they had instead remained and continued to haul and tow timber obviously pursuant to a provision of the extraction agreement. But the arbitrator had, in the concluding part of his reasoning, said:

> I am also satisfied that the claimant accepted the repudiation and did not by their words and conduct signified their acquiescence in the continuance of the [extraction agreement].

Does that mean that the arbitrator had taken the acts of hauling and towing into consideration but had found them not to constitute an acquiescence in the continuance of the extraction agreement? It cannot be so because he had stated that those acts were "irrelevant" and not that they do not constitute "acquiescence". The parties have argued their case on the assumption that once there was an election to keep the extraction agreement alive, the claimant lost its right to sue. I will defer to that proposition because the parties have apparently agreed and there was no dispute to the following authority, **Chitty on Contacts,** Vol. 1, 26th Edn., at para 1792, that was cited, *viz*:

> Affirmation. Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and

> treat himself as discharged, elects to treat the contract as continuing, he is usually said to have "affirmed" the contract.[9] He will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach,[10] and, secondly, he has knowledge of his legal right to choose between the alternatives open to him.[11] Affirmation may be expressed or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal[12] act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated.[13] Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.[14] Mere inactivity after breach does not of itself amount to affirmation,[15] nor (it seems) does the commencement of an action claiming damages for breach.[16] But if the innocent party unreservedly17 continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed to contract.
>
> Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable.[18] There is no need to establish reliance or detriment by the party in default.[19] Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged.[20] Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from treating himself as discharged.[21] Nor in the case of an on-going contract, will affirmation in respect of one breach preclude him from treating himself as discharged by reason of further subsequent breaches[22].

So, here the arbitrator had misdirected himself by failing to consider whether from the facts which I have related, it could be inferred that the claimant had elected to keep the extraction agreement alive after its repudiation by the applicant. Mr. Lawrence Chong submitted that because the Forestry Department had stopped all extraction operations, it was not possible for the claimant to elect to continue extraction even if they wanted to and this, according to Mr. Lawrence Chong, is what the arbitrator had found. I reproduce Mr. Lawrence Chong's argument in full, *viz*:

> Although the claimant wrote (*vide* C-3) that they were continuing with the extraction of timber this was in relation to the interim period pending clarification from the [applicant]. As a matter of fact the claimant had to abruptly stop felling of timber when the Forestry Department ordered the stoppage of all extraction operations in November 1982 (see p. 15 of Reasons for Award). Hence the order of the Forestry Department to stop all extraction in the said land made it impossible for the claimant to elect to continue extraction operations even if they wanted to. This is the learned Arbitrator's findings - see Reasons for Award pp. 14 and 15 on the 5th issue...)

Mr. Lawrence Chong is echoing the same reasoning of the arbitrator in relation to the 5th Issue and which I have already earlier set out but a repetition of the relevant part is necessary to bring into focus the misconception of the law, *viz*:

> Mr. Shim seems to suggest in his submissions that the acts of hauling and towing the felled timber to the log pond after the timber licence was cancelled meant that the claimant had carried on extraction operations within the meaning of the [extraction agreement]. The claimant lost the right to fell more standing timber as a result of the cancellation of the timber licence. This is the crux of their case, and with respect, the fact that the claimant continued to haul and tow away those timber already felled is therefore irrelevant.

What was said by the arbitrator, which I have just quoted, was in relation to the 5th Issue, which is, "Whether or not the claimant accepted the repudiation". Therefore, it cannot be true, as the arbitrator had put it, that the issue is only whether the claimant had lost the right to continue extraction of the timber. That is a serious misdirection. The 5th Issue is framed on the assumption that the claimant had been stopped from further extracting or felling timber on the said land. What has to be decided is whether as a result of the said stoppage the claimant had accepted the stoppage and thus put an end to the extraction agreement or whether the claimant had insisted on its continuance. This situation is governed by s. 40 of the Contracts Act and it reads:

> 40. Effect of refusal of party to perform promise wholly.

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

and **Chitty on Contract's,** *supra*, illustrates how the issue should be approached. Therefore, even though the applicant had disabled himself from performing his part of the extraction agreement and even though the claimant were prevented from felling timber, the claimant must still elect whether to accept the repudiation and thus bring an end to the extraction agreement or insist on its continuance and thus insist on the applicant doing all that is necessary to enable the claimant to continue to extract, haul and tow the timber. In the present case the claimant could insist on the continuation of the extraction agreement by continuing to do the acts required of the claimant, such as the hauling and the towing of the timbers under the extraction agreement and which the claimant in fact did. I have also said earlier the claimant in fact insisted on its continuance by its said letter. The arbitrator had completely failed to direct his mind to and therefore failed to consider whether or not the acts of hauling and towing the timber after the repudiation of the extraction agreement could constitute acts from which it could possibly be inferred that the claimant had elected to continue the extraction agreement. This error is apparent on the face of the award which I have already quoted. I have said that the facts could give rise to the inference that the claimant might have elected to keep the extraction agreement alive. Whether the claimant had really by those acts elected to keep the extraction agreement alive should properly have been the precinct of the arbitrator but he had failed to decide. From the facts of this case it cannot be said that there was no evidence from which the arbitrator could possibly hold that the claimant had elected to keep the extraction agreement alive.

Mr. Colin Lau had also argued, which is the 4th ground which I have set out, *supra*, that the arbitrator had made contradictory findings of fact. He argued that the arbitrator's finding that the claimant and Syarikat Wei Siong are separate legal entities is inconsistent with and contradicts the arbitrator's conclusion that the applicant had wrongfully repudiated the extraction agreement through a letter of the applicant to the Forest Department when the letter requested action only against Syarikat Wei Siong and not against the claimant. Mr. Lawrence Chong's reply was that the arbitrator had made a finding of fact that the applicant in writing to the Forest Department had intended to prevent the extraction of timber by the claimant even though the letter was directed at a Syarikat Wei Siong and that there is no inconsistency. That submission of Mr. Lawrence Chong, I agree. There is no error here on the face of the award.

The final argument of Mr. Colin Lau sounds like this. The arbitrator in holding that the letter just referred had the effect of stopping the claimant from extracting timber, the applicant should not be liable under the extraction agreement because the act of stopping the claimant from extracting the timber was the act of a third party, the Forest Department. Hence, argued Mr. Colin Lau, any action against the applicant must be based on tort for which the arbitrator has no jurisdiction. Again, I accept the reply of Mr. Lawrence Chong which effectively answered the argument of Mr. Colin Lau and it is this, I quote:

> The breach which gave rise to the claimant's cause of action against the [applicant] is the act of the applicant in writing [the letter] to the Forestry Department to stop Syarikat Wei Siong from further extracting timber on the land. It is that act of the [applicant] which gave rise to the breach as it resulted in the cancellation of the timber licence and the termination of all extraction operations of the claimant on the said land. By that act the [applicant] has disabled itself from performing the [extraction agreement] and is therefore an act of repudiation. Such act by the [applicant] clearly cannot be attributed to the act of a 3rd party.

The applicant had succeeded in one of the five grounds for setting aside the award. I therefore set aside the award save the part that dismissed the applicant's claim. It was very unfortunate that the arbitrator did not properly direct his mind to the facts and law concerning the question of election and this had resulted in the setting aside of the award. Even though the applicant has succeeded in its motion but it is clear that the applicant was in breach of the extraction agreement, I therefore order that the parties bear their own costs both here and below.